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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1929

No. 425

PANAMA MAIL STEAMSHIP COMPANY (a corporation),
Petitioner,

vs.

ERNESTINA ISABELLE VARGAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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SAN FRANCISCO

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I.

In this case where there are no findings and no opinion the court erroneously applies the principle that an upper court will not disturb, except for obvious error, the findings by a lower court made after hearing the testimony in open court. Such a decision is not merely, in our opinion, erroneous, but if established as the law it creates a situation most detrimental to the rights of litigants and the enforcement of justice in admiralty..... 9

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Panama Mail Steamship Company respectfully shows to this honorable court as follows:

A. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Ernestina I. Vargas seeks in this case to recover damages against the Panama Mail Steamship Company for an alleged criminal assault committed against her in October 1927 on the S. S. "Ecuador" by a steward named Jose Blanco. The action was brought in the District Court, for the Northern District of California, in Admiralty. The evidence introduced at the trial of the action consisted of testimony in open court, and also of various depositions, including the deposition of Jose Blanco. On December 15, 1928, the United States District Court, before which the matter was heard, ordered a decree for the libelant in the sum of ten thousand ($10,000) dollars and costs. In accordance with the order a final decree was entered on December 24, 1928. The United States District Court wrote no opinion and made no findings in the matter. An appeal was thereafter taken to the Circuit Court of Appeals for the Ninth Circuit, which court, on July 15, 1929, affirmed the judgment, refusing to review the decision of the District Court, on the ground that it was based on conflicting testimony.

B. THE DECISIONS BELOW.

The case was submitted on August 16, 1928. On December 15, 1928, the following order was entered:

> "It is ordered that the libelant have judgment for ten thousand ($10,000) dollars, with costs of suit.
>
> Let the plaintiff's counsel prepare decree accordingly."

On December 24, 1928, a final decree was entered. The Circuit Court of Appeals affirmed this judgment on July 15, 1929. The only part of the opinion of the Circuit Court of Appeals which is not purely formal reads as follows:

"The utmost that can be claimed by the appellant is that the adverse decree is based on conflicting testimony taken largely in open court. Only two witnesses, the appellee and the steward, gave direct testimony concerning the alleged assault. The testimony of the appellee fully supported the charge, and that of the steward denies it in toto. The appellant contends, however, that the testimony of the appellee should be rejected because she made no outcry at the time and did not complain of the outrage committed against her for a period of some five months, or until she discovered that she was pregnant. A number of criminal cases have been cited in support of this view, but whatever the rule may be in such cases we think it is well settled that in civil cases no such strict rule obtains, and that the credibility of the complaining party is for the court or jury, in view of all the surrounding circumstances. Deah v. Raples, 39 N. E. 952; Linville v. Green, 102 S. W. 67; Schenk v. Dunkelow, 37 N. W. 886; Kramer v. Weigand, 135 N. W. 230; Jensen v. Lawrence, 94 Wash. 148.

"The court below, after hearing the testimony of the appellee, together with her reasons for not making an outcry and for not sooner complaining of the outrage, gave credence to her story, and it it is not for us to say that the court erred in so doing. For if the case made by the appellee was not entirely free from suspicion, the defense itself was weak. The brief of the appellant practically concedes that the steward had sexual intercourse with this passenger, claiming that it was voluntary, but if no such concession was made, the overwhelming weight of the testimony clearly establishes the fact. And from that fact, two con-

clusions follow. First, that the chief witness for the appellant was guilty of false swearing, and, second, that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed. Without attempting to further review the details of the testimony, from which no good can result, we deem it sufficient to say that this case belongs to that class where appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law.

"The appellee contends that the decree was less than it should have been, but we find no abuse of discretion in that regard.

"The decree is affirmed, with interest from its date, and for costs in this court."

C. THE REASONS FOR GRANTING THE WRIT.

The bases on which a writ of certiorari is sought herein are as follows:

1. The effect in the Circuit Court of Appeals of a judgment in the District Court in Admiralty where no findings are made and no opinion is written, is of the utmost general importance. In the present case the Circuit Court of Appeals treats the mere entry of a decree without findings or opinion as the equivalent of a specific finding for the plaintiff on all the facts put at issue by the pleadings. This is a vast extension of the general rule that a finding of the District Court will not ordinarily be disturbed where it is based on conflicting evidence given by witnesses personally appearing in the court below. If the ruling of the Cir-

cuit Court of Appeals in the present case is correct and remains the law the greatest possible encouragement is given to the District Courts never to write any opinions and never to make any findings, and a situation is created which is certain to work the greatest hardship and injustice on litigants bringing actions in Admiralty in the United States District Courts.

2. The decision in the present case by the Circuit Court of Appeals for the Ninth Circuit is at variance with the decision of the Circuit Court of Appeals for the Second Circuit as expressed in the *City of New York,* 54 Fed. 181. The decision of the Circuit Court of Appeals held that the fact of the admitted failure of the plaintiff to make any outcry on the passenger steamer at the time she claimed she was assaulted, and of her admitted failure to complain to any one about the alleged attack for a period of some five months after the attack, would not affect the credibility of her evidence in the Circuit Court of Appeals. This holding is of general importance to all operators of steamship lines, and to all employers of any labor where there is any possibility that some person may later sue the employer on a claim based on attack by the working man.

3. The judgment is not sustained by the evidence introduced before the court, and in the opinion of petitioner the judgment would never have resulted had the record been carefully examined with a view to making careful findings to be entered by a court considering the matter *de novo.*

Ernestina I. Vargas was, at the time of the alleged attack, a native of San Salvador, 24 years old, and coming to San Francisco on the S. S. "Ecuador" owned and operated by the Panama Mail Steamship Company. She did not speak English. Jose Blanco was a half Spanish, half Filipino, steward. The libelant, Vargas, boarded the S. S. "Ecuador" on October 10, 1927, at 4 P. M., and the attack was alleged to have been committed about October 12th at about 6:30 A. M. Nothing was known by anyone connected with the Panama Mail Steamship Company, excepting this steward, about any claim of attack until March 15, 1928, when the libelant, Vargas, had Blanco arrested on a charge of rape. This charge was immediately dismissed by the United States Commissioner as being unsupported by the testimony given by Ernestina Vargas. When Blanco was arrested and immediately discharged the port steward of the Panama Mail Steamship Company was acquainted with the fact. Nothing was known about a claim against the Panama Mail Steamship Company until March 21, 1928, when Ernestina Vargas sued the Panama Mail Steamship Company for $50,000 on a libel based on this alleged attack. In her testimony given in open court the libelant, Vargas, stated briefly as follows:

She unlocked the door on the morning of the attack and very shortly afterwards in came Blanco. Blanco asked her if she would have any coffee, later took her hand and attacked her. She did not call out because it did not occur to her and because she did not know who would come to her aid. She also stated that on account of the early morning noises on board the vessel

she did not think it possible to be heard. After the attack she went to breakfast and said nothing to anybody. She never told anyone about the attack until some months after she arrived in San Francisco and learned that she was pregnant. Blanco wore her ring on his finger for some days during the voyage. When the vessel arrived in San Francisco she introduced Blanco to her brother and said that he had taken care of her ring for her. Blanco came to her brother's house and had dinner with her and her brother's family and later entertained her and her brother and her brother's family at a restaurant and at a theatre. Blanco took her and her relatives on two automobile rides. There were various exchanges of presents between Blanco and her brother's family. Later she learned that she was pregnant and about the same time learned that Blanco was married. She then had him arrested. The libelant's brother and sister-in-law testified regarding their entertainment of Blanco and Blanco's reciprocation of entertainment, including automobile rides for them and for the libelant, Ernestina Vargas. They also testified regarding various exchanges of different presents, including a canary bird, shoes, etc., between Blanco and the Vargas family. They also gave evidence of their learning of the condition of Ernestina Vargas and of the interview with Blanco at which it was discovered that he was married.

Blanco constantly denied that he ever had any relations with the libelant, Vargas, although he admits that he knew her and had become acquainted with her family after the ship arrived in port. Throughout the

record, there was considerable testimony produced by the libelant that Blanco was much interested in the child which the libelant was to have.

Wherefore, your petitioner prays that this honorable court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Ninth Circuit to bring up this case to this honorable court for such proceedings as to this honorable court may seem just.

Dated, San Francisco,
September 23, 1929.

THOMAS A. THACHER,
Attorney for Petitioner.

THACHER & JONES,
HARRISON A. JONES,
W. KEVIN CASEY,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition in my opinion is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

Dated, San Francisco,
September 23, 1929.

THOMAS A. THACHER,
Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

IN THIS CASE WHERE THERE ARE NO FINDINGS AND NO OPINION THE COURT ERRONEOUSLY APPLIES THE PRINCIPLE THAT AN UPPER COURT WILL NOT DISTURB, EXCEPT FOR OBVIOUS ERROR, THE FINDINGS BY A LOWER COURT MADE AFTER HEARING THE TESTIMONY IN OPEN COURT. SUCH A DECISION IS NOT MERELY, IN OUR OPINION, ERRONEOUS, BUT IF ESTABLISHED AS THE LAW IT CREATES A SITUATION MOST DETRIMENTAL TO THE RIGHTS OF LITIGANTS AND THE ENFORCEMENT OF JUSTICE IN ADMIRALTY.

From the earliest times the Federal Appellate Courts have recognized the principle that findings of

fact made by trial courts should not lightly be disturbed. This salutary principle was applied by District Courts in the consideration of the findings of Commissioners as well as to the findings of courts themselves.

The Albany, 48 Fed. 565;
Parsons on Shipping and Admiralty, 215;
The Providence, 98 Fed. 133.

It was dependent on the principle that a Commissioner or a judge was to be presumed correct if, having actually heard two witnesses give conflicting testimony he specifically upheld the testimony of one witness. This being the basis of the rule it did not apply to cases where the testimony was taken by deposition.

Lazarus v. Barber, 136 Fed. 534.

The rule was applied in the early days when the District Courts were the only Federal Courts of first instance, and the Supreme Court the only Appellate Court.

The Marcellus, 1 Black 414, 17 L. Ed. 217.

It was applied when the Circuit Courts were created and given jurisdiction over the District Courts, and it was adopted when, in 1891, the present Circuit Courts of Appeal were created and the appellate powers of the Circuit Courts abolished.

Literally hundreds of opinion have been written stating that

> "findings of fact by the District Court on conflicting evidence where the witnesses were examined in open court will not be reversed unless

manifestly contrary to the evidence." (*American & Eng. Enc.*, Vol. I, p. 1359.)

The Sampson, 4 Blatchf. 28;

Levy v. The Thomas Melville, 37 Fed. 271;

The Captain Weber, 89 Fed. 956.

As is the case with many general rules, the history and the meaning of this principle have sometimes been forgotten or misunderstood, and sometimes its language has been garbled. Like every such axiom, rightly applied it is productive of good law and sound justice, but carelessly applied or used to avoid the necessity of examining the facts of a case it can produce great injustice. If two witnesses appear before a District Court and give conflicting evidence a specific finding by the District Judge should be given great weight. But this does not mean that when a District Judge gives a decision in a case involving both facts and law, and does not state, or in any way indicate, the grounds he decides the case on, the upper court is to simply wash its hands of all responsibility by stating the case to have been one involving facts. That essentially is what the Circuit Court of Appeals did in the present case.

As will be later more fully commented on, there is nothing which indicates the basis of the opinion of the District Court. The woman claimed that she was assaulted on October 12, 1927. She admitted that she never called out when attacked and that she never complained to anyone until some four months after the attack. She admitted that she introduced this steward to her brother; that an acquaintance began between the steward and her brother's family with

whom she lived; that she and her brother's family dined with this steward on at least three occasions and were given automobile rides by him, and that numerous presents were exchanged between this alleged attacker and her own family. After it had been found out that Blanco was married and that the Vargas woman was pregnant she had him arrested. United States Commissioner Krull dismissed the charge with an entry in his official diary:

> "After a detailed and full hearing the evidence is not sufficient to warrant a holding on the charge of rape, and the case is accordingly dismissed and the defendant discharged for this particular offense." (Krull Rec. 203.)

Commissioner Krull testified that "United States Attorney suggested that the plaintiff might pursue her remedy in the state court." (Krull Rec. 202.) This testimony given by Miss Vargas before United States Commissioner Krull was introduced in full in the record. It was the only testimony which was taken at that hearing and was entirely uncontradicted. Yet Commissioner Krull testified that it did not make out a case of rape, refused to hold the steward Blanco, and suggested, as the place to obtain relief, the state court where cases of seduction and bastardy can be dealt with.

In the face of all this evidence the District Court did not make a finding or write an opinion, but simply ordered the Panama Mail Steamship Company to pay the woman $10,000. There is not the slightest suggestion in the record as to whether the District Court gave this woman $10,000 because it thought it

was a case of rape, or seduction, or because it thought a steamship company could be held to pay a passenger in a bastardy case involving a Filipino steward. It may well have had some theory that if a steward has relations with a passenger on board a vessel, the ship owners can be later held if a child results. There is no finding of fact of any character, and there is no conclusion of law. It would have been difficult, if not almost impossible, for a court to write a careful opinion in harmony with the law on the subject and which found that Blanco had actually attacked this woman, and found that, as a matter of law, the attack constituted rape, in view of the failure of the woman to make the utmost resistance, and her failure to complain to anybody regarding the incident for more than four months. Such a decision, if made by the District Court, would have been in absolute conflict with the decision of the United States Supreme Court in the case of *Mills v. United States,* 164 U. S. 644, 648, 649, where the court said, referring to the law of rape:

> "* * * though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man."

We do not think, and we cannot think, that the United States District Court, in the present case, is to be held by the Circuit Court of Appeals as, in fact, ignoring a decision such as that of the United States Supreme Court. The decision of the United States Supreme Court in the *Mills* case (supra) is in entire harmony with practically every other case dealing

with the law of rape. As the United States Supreme Court said in the *Mills* case (supra):

> "The crime itself is one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against; and it has been said that very great caution is requisite upon all trials for this crime, in order that the natural indignation of men which is aroused against the perpetrator of such an outrage upon a defenseless woman may not be misdirected, and the mere charge taken for proper proof of the crime on the part of the person on trial."

From the time of Blackstone the law has been:

> "If she concealed the injury for any considerable time after she had opportunity to complain; if the place where the act was alleged to be committed was where it was possible she might have been heard and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned." (*Blackstone*, Vol. 4, Sec. 212.)

As was said in *Lind v. Closs,* 88 Cal. 6, 13, a case involving a civil action for rape:

> " 'It has been several times held in this state, where the accused parties have been convicted of rape on the testimony of the complainant alone, and under circumstances tending to throw discredit upon her testimony, that the judgments should be reversed, the court saying that "a conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials," and that "the ends of justice demand that the cause shall be tried anew. * * *
>
> " 'We think these cases in point here, and that the ends of justice require that this case be tried anew.' "

As was said in *People v. Benson,* 6 Cal. 221, 223:

> "There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance."

As was said in *Oleson v. State,* 11 Neb. 276:

> "Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity."

In the present action the woman testified that after the attack she got up and went to breakfast without saying anything to anyone.

We do not think that this is a time to discuss in detail the various cases involving the law of rape. Such a discussion more properly belongs on a hearing of the action. What the petitioner does call attention to is the fact that the courts at every time have held that where the woman makes the greatest possible resistance including the weapon of calling out, the crime is not rape. And the courts have also held that the complaint is practically shown to be false if the woman, after the attack, does not complain to anyone. This does not mean that such a failure to complain is conclusive, but it does mean that such a failure is the strongest kind of evidence that the woman was not attacked and that her story was an afterthought designed for revenge, cupidity or for some other reason.

The court not having written any opinion or made any findings it is practically impossible to definitely point to the theory on which the court decided the

case. It was, however, manifest throughout the trial that whether or not Blanco was the father of the child was the question to which the court seemed to pay the greatest attention. From the assignment of errors it can be seen that the court again and again admitted testimony of witnesses for libelant stating that Blanco had stated that he (Blanco) would help pay a part of the expense of maintaining the child. A reading of the rulings of the District Court on the evidence indicates that the fatherhood of the child seemed to be the point on which the case was to be determined—as if the mere fact that Blanco was or was not the father of this child would determine the liability of the Panama Mail Steamship Company.

Yet, in spite of the fact that the cases and law dealing with rape would make it practically impossible for a judge to give any well considered opinion bringing within the scope of the word "rape" any acts of Blanco as testified to by the libelant, Ernestina Vargas, the Circuit Court of Appeals merely refused to concern itself with the application of the law of rape to the facts of the case and dismissed the action with the words "we deem it sufficient to say that this case belongs to that class where Appellate Courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law." Parenthetically it may be again stated that the testimony of this man Blanco was not taken before the District Court, but was taken on deposition.

The decision in the District Court has nothing to do with the principle that findings of fact by the District Court on conflicting evidence will not be reversed unless manifestly contrary to the evidence. There was never a finding of fact and not a suggestion of a finding of fact.

The importance of this case is not merely the fact that this defendant has been penalized $10,000. That is relatively unimportant when the effect of such a decision is considered. A case is tried in which a Central American woman presumably has been imposed on by someone. We say that because she was the mother of an illegitimate child. She sues the employer of the man who is alleged to have done her a wrong. On her own story, if the law is carefully considered, no crime of rape has been committed. The employee concerned has been freed of all criminal responsibility after examination of the charge by the United States Commission. Yet the man is obviously guilty of rape in case the defendant in this action is liable. The court simply enters a judgment against the defendant for $10,000 without giving any reasons whatsoever.

The significance of the case lies in the necessary effect which will result if all such decisions rendered without opinions or findings are to be affirmed. Here, because there was no opinion and no findings, the court did not examine into the subject of whether there was sufficient evidence to support the findings. Because there were no conclusions of law the court did not consider whether conclusions were correct. It gives the District Court the benefit of every pos-

sible doubt, both of law and of fact, and because it saw that a question of fact might have been involved it took the ground that a question of fact was involved and was the basis of the opinion. Because it saw that a question of fact might have been a basis of the opinion the Circuit Court of Appeals refused to look into the matter any further. In other words, as the law is applied in this particular case, a District Court which makes no findings and writes no opinions in any case is in the strongest possible position before the Circuit Court of Appeals. The appellant is more or less helpless because he does not know the grounds the court had in mind. The court has made no misstatement because it has made no statement at all. The upper court takes the position that there is a possibility of a question of fact and therefore refused to hear the case further or to enter into any discussion of the law and facts. A state of law more disastrous to litigants before the United States District Court can hardly be imagined. A premium is being set by the Circuit Court of Appeals on a judge's action if he neither writes an opinion nor makes a finding. If any fact can possibly be brought into the case, or thought into the case, his judgment will be affirmed. But a court which applies itself to a case and definitely states the grounds on which it reaches its conclusion and writes an opinion and enters a judgment is in a far weaker state because if the reasons are incorrect the Circuit Court of Appeals will reverse the case. If a premium is placed, as it is placed, on the mere entry of judgments without opinions or findings another result is inevitable. The

entry of findings, and certainly the writing of a careful opinion insures the litigant careful consideration of his case. Anyone who is familiar with the record can tell from an opinion whether careful consideration has been given. If the upper courts are to welcome the entering of decisions with no findings and no opinions they are welcoming a situation which is certain to result in some courts giving very little consideration to many cases. In admiralty, due to the necessity of the case, a large amount of the testimony has to be taken on deposition. It is very laborious for any judge to examine depositions. Anyone familiar with admiralty matters knows it. It is not like listening to testimony in open court and deciding on what happens from hearing the testimony in open court. It seems absolutely essential for the protection of the rights of litigants in admiralty that no system be built up by which courts are encouraged, and indeed rewarded for entering judgments in which neither conclusions of fact or opinions are handed down. It cannot but result in an intolerable situation, destructive of the rights of litigants and making the path of the Supreme Court in dealing with admiralty cases most difficult.

II.

THE DECISION APPLYING THE GENERAL RULE REGARDING FINDINGS TO A DECISION WHERE THERE ARE NEITHER FINDINGS NOR AN OPINION IS IN CONFLICT WITH THE RULE OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This question was brought up in the case of the *City of New York*, 54 Fed. 181. There the court held that although the opinion of the trial judge in an admiralty case will not be disturbed on appeal as to questions of fact depending on the credibility of witnesses examined in his presence unless there is a decided preponderance of evidence the other way, his decision rendered without an opinion cannot be reviewed conformably with that rule, and on appeal therefrom, the appellate court will decide such questions of fact as best it may on reading the record. In that case the Circuit Court of Appeals dealt with the question as to whether there is any application of the findings rule to a case where there is no opinion. The court decided in the negative and used the following language:

> "The learned district judge who heard this cause in the court below did not express any opinion in deciding it upon the facts or law of the case, and we are wholly uninformed of the reasons which led him to conclude that the libelants were entitled to recover. In controversies involving questions of negligence there is usually less difficulty in applying the rules of law to the facts than in ascertaining what the facts really are. In the present case the findings of the trial judge, in whose presence the important witnesses for the parties were examined, would have been most persuasive with this court in determining the facts, and probably would have been controlling, because the testimony is conflicting, and its

weight and force depends upon the credit to be given the witnesses. The demeanor of the witnesses is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in admiralty that the opinion of the trial judge will not be disturbed upon questions of fact, depending upon the credibility of witnesses who were examined in his presence, unless there is a decided preponderance of evidence the other way. Under the present circumstances, we must decide all questions of fact depending upon the credibility of witnesses as best we may upon reading the record.

"It has been urged for the appellees that the decision of the district judge, without an opinion, is equivalent to the general verdict of a jury upon the issues of fact, and is necessarily a decision in favor of the libelants upon all litigated questions of fact necessary to a full recovery. We cannot for a moment assent to this proposition. How can a reviewing court know what question of fact entered into the decision until it is informed what the judge decided as matter of law? We can hardly suppose in this case that the learned judge regarded the steamship as an insurer of the safety of the injured tug; but if he did, in the view which we take of the law, his decision could not involve any finding upon the most essential facts of the case."

It is realized that it is a difficult task for any Circuit Court of Appeals to consider a case absolutely *de novo*. However, it is a no more difficult task than it is for the litigant who has a case decided against him where he has no knowledge as to the real ground on which the case was decided. The litigant is far better off in a trial before a jury because there, at least, the judge must give instructions. Where the court simply decides a civil action with no opinion and no

findings the court may be deciding it on a ground which is absolutely contrary to every conception of law. In spite of this fact, under the decision made by the Appellate Court in this case, regardless of the real ground for the decision of the judge, the Circuit Court of Appeals, if facts enter into the case at all, will affirm the judgment. The language by Wallace, C. J., in the *City of New York* (supra) states:

> "How can a reviewing court know what questions of fact entered into the decision until it is informed what the judge decided as matter of law."

In this particular case, if we are to judge from the rulings which the court made, the district court thought the question of liability turned to a large extent on whether or not this steward Blanco was the father of the child. As the assignments of error show, the court again and again admitted evidence of alleged statements by Blanco tending to show that he was interested in the welfare of the child. It is obvious that such evidence is not evidence which should properly result in the Panama Mail Steamship Company being held liable for rape. Yet this theory of the case, if we are to judge from the rulings referred to in the assignments of error, was exactly what was in the judge's mind.* How, then, is this Circuit Court of

---

*As an instance of these rulings indicating the thought of the District Court:

"Mr. HUTTON. Did Blanco on that occasion say that he would get a divorce from his wife, that he had not any cause for divorce against her?

Mr. THACHER. I would like to object to that. Whatever that may be against Blanco certainly it is not relevant against the Panama Mail.

The COURT. Overruled." (Rec. p. 162.)

"Q. You gave him a pillow for a pair of shoes?

A. Yes." (Ralph Vargas, 112.)

"Q. Your wife asked him for a parrot?

A. My wife asked him for a parrot and he was going to bring it." (Ralph Vargas, 113.)

Appeals, or any appellate court, to state exactly the grounds on which this case was decided, and how can it reasonably refuse to examine the testimony taken in the court below.

III.

THE INJUSTICE WHICH THE APPLICATION OF THE FINDINGS RULE LEADS TO IN THE PRESENT CASE.

A great deal was said by libelant's attorney in the District Court and also in the Appellate Court regarding the hardship in which Miss Vargas was placed by the birth of an illegitimate child. We do not question the difficulties in which Ernestina Vargas, or any other unmarried mother, is placed, but that, in itself, is no reason why the Panama Mail Steamship Company should pay her $10,000.

Re-examining the evidence in writing this petition for writ of certiorari, it seems almost unbelievable that this was anything more than the squalid affair of a Central American native woman, of mature years, with this half Filipino steward. The woman did not call out, although the passengers all over the ship were getting up for breakfast, and although the testimony shows that there was a direct open screen over her door through which her voice would have carried right up an alley on both sides of which were state-

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He was thought to be a wealthy waiter.

"Q. Did he have an automobile?

A. Yes, two automobiles." (Ralph Vargas, 112.)

After the discovery that the libellant was pregnant, the following conversation took place:

"He (Blanco) said, 'I can't marry her now because I have a very important engagement.' I said, 'What can it be, are you married?' And he said 'Yes, I am married and I have some children.'" (Mildred Vargas, 143.)

rooms. She testified that she did not call out, first, because she did not think of it, second, because there was too much early morning noise going on aboard the ship (evidently the noise of the ship's employees busy making ready for breakfast and of passengers who had gotten up), and third, because she did not know who would come to her assistance. (As if any woman being criminally assaulted would care who came to her assistance as long as she was rescued.)† She stated that after the assault was over she went up and had breakfast. This in itself belies her excuse that she had been very seasick. She testified that this man Blanco wore her ring on his finger for many days during the voyage—as if a man who had attacked a woman and robbed her would walk around with the proof of robbery on his finger. She testified as to her introducing the man to her brother, and of the various entertainments which resulted from that introduction and in which she and her brother both participated.‡ Yet here, because no opinion was written, the Circuit Court of Appeals treats the lower court as having specifically found that criminal assault was first commit-

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†"I did not holler out because it did not occur to me." "Not knowing who would come to my aid, and my voice might not have been heard and on account of the noise that there is in the morning aboard ship, I did not think it was possible to be heard." (Vargas, 33, 34.)

"Q. What did you do when you got up?
A. I went to breakfast.
Q. Did you tell anyone about this?
A. No, I said nothing to anybody." (Vargas, 71.)

‡"Q. Did you present him to your brother?
A. Yes, I introduced him at that time and said he had taken care of the ring for me." (Vargas, 72.)

"Q. You asked him right afterward to dinner?
A. I asked him right afterward." (Ralph Vargas, 110.)
"Yes, we went to a theatre." (Vargas, 77.)

He was considered a suitor. Ralph Vargas said of his wife:

"A. Well, she said that fellow was bothering her and my wife told me that. She said that fellow, he wants to marry your sister." (Ralph Vargas, 115.)

ted on this woman, and then that after the occurrence, and after the arrival of the steamer in San Francisco, the criminal was freely entertained at affairs in which the woman assaulted participated. However sordid the society of Filipino waiters and the women with whom they consort may be, it seems unbelievable that even with them women freely associate with men who have assaulted them. However, this is to be said, if that were the case it would show the slight consequence an attack of the kind alleged made on a woman of this kind.

We do not believe that the District Court, having carefully reviewed the testimony in the case, and bearing in mind the various cases in point, made any such finding of fact. If he had made such a finding of fact, and if he had reconciled the opinion of the Supreme Court on the law on the subject of facts, we do not think he would have made the decision he did. We think that probably there was some theory in his mind about liability of vessels resulting from any acts of their employees. We doubt if he really meant to go so far as to take it that the Panama Mail Steamship Company would be held liable if Blanco was the father of the child—regardless of the circumstances of the relations of Blanco and the libellant. But we do not believe that he gave any great consideration to the cases defining the law of rape.* Here then, is this de-

*How inadvised the lower court was in regard to the law of rape was shown by the refusal of the court to allow the defendant to show that if the libellant had screamed she would have been heard:

"Mr. THACHER. What would be the effect of any unusual noise in room 31?

A. It would be heard in the alleway.

Mr. HUTTON. I object to that on the ground it is calling for the opinion of the witness.

The COURT. Sustained. I have not heard any testimony of any noise whatever." (Rec. p. 189.)

fendant, the Panama Mail Steamship Company, which is held liable without any findings and without any opinion by the court below, and for facts which convinced the United States Commissioner that the crime charged had never been committed. It was held liable in a case where the various cases dealing with rape cannot be reconciled with any holding that rape was committed in this case, and it is held liable without any opinion at all. On appeal the Appellate Court refused to examine the matter because it held that facts were involved and for that reason the decision of the lower court would not be interfered with. This is in the face of the fact that the decision of the lower court was nothing except an order to pay $10,000. It is hard to imagine a case which could arise in which the defendant would seem more entitled to an expression of opinion by either the trial court or the Appellate Court on the facts themselves, and where, if the defendant is to be held liable, the exact reasons for which he is held liable should be pointed out and the law reconciled with that of the elementary law on the subject.

IV.

THE OPINION OF THE CIRCUIT COURT OF APPEALS SHOWS THAT THAT COURT DID NOT GIVE ANY CAREFUL CONSIDERATION TO THE FACTS INVOLVED.

An examination of the two-page typewritten opinion filed in this case shows that the upper court, imbued with the theory that facts were involved, did not give any careful examination to the evidence. This can be seen by the language of the opinion. Aside

from the purely formal opening in the opinion the court states:

> "The utmost that can be claimed by the appellant is that the adverse decree is based on conflicting testimony taken largely in open court."

We fail to understand how any such theory can be advanced. As stated above, the woman testified herself that she did not call out. The evidence shows that there was assistance at every hand. Her testimony immediately opened up the question of law as to whether a woman who is attacked when there is assistance at every hand, but who, for her own reasons, saw fit not to call out, can be held to be criminally assaulted. The courts have uniformly held that it is the duty of the woman to use every means possible for defending herself, including her most effective weapon of screaming, and that if she does not resist to the maximum she has not been criminally assaulted. Upon the testimony of the Vargas woman alone the question is immediately opened up as to whether, under the cases, this could be considered in any respect a criminal assault. This question was never passed on. The facts as constituting rape in view of the cases presents an immediate question of law.

So far as conflicting testimony taken largely in open court is concerned, it must be remembered that the Vargas woman testified in open court, but that the steward Blanco testified on deposition. It cannot, in any sense, be viewed as a case where both witnesses testified in open court because they did not so testify.

But the opinion then goes on to state:

> "Only two witnesses, the appellee and the steward, gave direct testimony concerning the alleged

> assault. The testimony of the appellee fully supported the charge, and that of the steward denies it in toto. The appellant contends, however, that the testimony of the appellee should be rejected because she made no outcry at the time and did not complain of the outrage committed against her for a period of some five months, or until she discovered that she was pregnant."

We do not state that the testimony should be in all respects rejected because the woman admittedly made no outcry. But we do say that if the woman made no outcry when the evidence shows clearly that assistance was at hand, then the crime is not, under the decision of the United States Supreme Court, rape. Regarding her concealment of the alleged attack, that is another matter. We state that under the law, as we have already cited it, if a woman conceals an injury of this character for any considerable time such a circumstance is very strong evidence that her testimony is false, and this is the law of rape. The cases cited by the Circuit Court of Appeals in connection with the failure to call out we will deal with shortly. They do not in any way affect the law as the Supreme Court stated it in the *Mills* case (supra) and as it is generally recognized.

The Circuit Court of Appeals stated:

> "The court below, after hearing the testimony of the appellee, together with her reasons for not making an outcry and for not sooner complaining of the outrage, gave credence to her story, and it it not for us to say that the court erred in so doing."

This sentence refusing to consider the facts is in absolute harmony with the conclusion of the opinion in which it is stated:

"Without attempting to further review the details of the testimony, from which no good can result, we deem it sufficient to say that this case belongs to that class where appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law."

These two sentences show the clear basis of the opinion of the upper court. It thought that there were facts in the record and although the question submitted was largely a question of mixed law and facts the upper court refused to consider the matter because the lower court had made a decision. It was not that the lower court had entered a finding because there was no finding. It was merely because the lower court had decided the case at all that the upper court refused to even consider the facts although the questions presented were of mixed fact and law. Very clearly the upper court simply shut its mind after it made out that the basis of the claim was a charge of rape.

The opinion states:

"For if the case made by the appellee was not entirely free from suspicion, the defense itself was weak. The brief of the appellant practically concedes that the steward had sexual intercourse with this passenger, claiming that it was voluntary, but if no such concession was made, the overwhelming weight of the testimony clearly establishes the fact. And from that fact, two conclusions follow. First, that the chief witness for the appellant was guilty of false swearing, and, second, that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed."

The upper court misunderstood the brief of the petitioner if it thought there was any concession of the relations between the Vargas woman and this Filipino. We take the position now, and we have always taken the position, that we do not know anything about it. Oriental waiters are rather a low class, as anyone knows who has employed them. What Chinamen or Japanese or Filipinos do when they are not actually waiting on table or looking after a house is something which few employers know. Their idea of the relation of the sexes is as different from the American idea as is possible. They are an entirely different race of people. The fact that this Filipino waiter was ingratiating himself with the family of this libellant, Vargas, indicated that he had some motive, and an obvious motive would be possible relation with this woman, Ernestina Vargas. We think it probable that this Filipino waiter was giving these various presents to the libellant's family because of his concealed relations with this woman.* It is all a matter of surmise because both the woman and the waiter deny it. So far as our opinion of the libellant is concerned, and what she may have done, it is simply based on the fact that in our experience even semi-white women who consort with orientals are of a very low class. Throughout this case we consistently but unsuccessfully endeavored to point out to the District Court that the paternity of this child cannot be the turning point on which the case should be decided.

*Our suspicions were strongly supported when libellant Vargas testified to receiving from libellant in December, 1927—two months after the alleged attack—a card (introduced for identification) signed "Your loving Blanco" and beginning "It is Christmas. I wish you happiness sweetheart." (Rec. 49, Libelant's Exhibit No. 4 for identification.)

The only question is whether on the date in question this Filipino steward attacked this woman.

The conclusions which the Circuit Court of Appeals draws are proof that the case received very small consideration in the Appellate Court. The statement of the court that if the steward had relations with this passenger then the steward "was guilty of false swearing" is perfectly obvious. We do not deny that this steward is guilty of false swearing. The Panama Mail Steamship Company when sued, was, of course, absolutely in the hands of the two parties, the man Blanco and the woman Vargas. It had no other means to check up the story. An immediate investigation at the time of the offense would have shown definitely whether the woman was telling the truth or not. Because the woman waited for nearly five months the Panama Mail Steamship Company was largely in the hands of this Filipino steward Blanco. Blanco denied that he ever had anything to do with the woman at all, with the exception of the various entertainments after the ship arrived in port. He is a Filipino and from the testimony in this case we think that he lied to us. Anyone having experience with certain classes of these orientals knows that very rarely do they tell the truth. We do not condemn all Filipinos, but anyone who has lived on the West Coast, or had these Filipinos as household servants, knows that they are anything but truthful; that they tell all kinds of stories; that they are not honest like the Chinese, and that they have many faults. In spite of this fact they are frequently employed as servants on the West Coast by individuals in their homes and also by companies as

waiters, because it is difficult to obtain anyone else. We will freely admit that this witness probably did not tell the truth to us or to anyone else. But the fact that a Filipino waiter from whom little can be expected in the way of integrity happened to be the Panama Mail Steamship Company's only witness, cannot condemn the Panama Mail Steamship Company. In this connection it may be said that while Filipinos are very frequently liars and sneaks and thieves, it is very seldom that they commit, against white persons, crimes of any great violence such as murder or highway robbery or assault. They are a different class of people from the gangster type prevalent in certain cities.

The principal deduction made by the court is, however, that the paternity of the child by this waiter proved "that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed." Such a conclusion is, right on its face, not warranted.

We have not mentioned this girl, but the Panama Mail Steamship Company fortunately was able to locate another Central American woman who occupied the stateroom with Ernestina Vargas from the time when Ernestina Vargas came on board the steamer "Ecuador." This woman, who was subpoenaed, testified that she was there the entire time and that no such attack was ever committed on Ernestina Vargas. (Villavicencio 169.) This independent testimony showed that the story was made up of whole cloth and evidently fabricated, first, to punish Blanco when

he refused to support her child, and for vengeance, and second, as a means to attempt to get money out of the Panama Mail Steamship Company. This conclusion shows how little consideration the Panama Mail Steamship Company received in the upper court. The fact that Blanco was the father of the child was no proof that Blanco assaulted the woman. Certainly the birth of a child from an illegitimate union does not mean that the mother was assaulted, yet that is exactly what the Circuit Court of Appeals in effect holds. We call particular attention to it because it is all in line with what we believe, to wit, that the Panama Mail Steamship Company never, from any court, received any careful consideration in this case. Both courts seemed to be imbued with what the United States Supreme Court termed in the *Mills* case (supra) "the natural indignation of men which is aroused against the perpetrator of such an outrage," and have simply held the Panama Mail Steamship Company liable to pay the woman $10,000. The decision of the upper court and the lower court is just exactly of the type to be expected if the United States District Courts are encouraged, and in fact rewarded, for neither writing opinions or making findings, and after that has been done the upper court washes its hands of all responsibility by simply declaring that if any facts might have been involved then the decision of the lower court would be affirmed.

The cases cited by the Circuit Court of Appeals relative to the rule in civil cases regarding the necessity for calling out or for complaining are, in our opinion, of a kind entirely different from the case at

issue. They, of course, all concern cases which were brought against the actual perpetrator of tthe crime and none of them deal with cases where the employer is sued. Certain of the cases are not rape cases at all, but are merely assault and battery cases—a class of case which is naturally regarded as much less serious at law and which carries much less damages than an actual rape case.

In *Dean v. Raplee* (N. Y.), 39 N. E. 952, a 14-year-old child, an orphan, was taken into the house of the defendant under an arrangement by which he was to board, clothe and educate her. The young girl was totally inexperienced, threatened by this defendant to whom, as an orphan, she had been turned over, and was obviously, because of her "extreme youth, inexperience, and dependence united with the principle of fear and obedience," terrified of her custodian. The court laid great stress on the fact of her youth and on the fact that "consent or nonresistance on the part of a girl of that age was not to be understood in the same way as in the case of like acts committed upon a woman of more mature years." On a divided court, three to two, in which Judge Peckham, later Mr. Justice Peckham, of the United States Supreme Court, and Judge Edward T. Bartlett dissented, the judgment was upheld.

A case more different from the present action can hardly be imagined. In this case the woman was 24 years old, and far from being in the custody of the defendant, she was like any other passenger on board the ship, and she was a member of her brother's

family in San Francisco for months before she saw fit to mention the alleged attack.

In *Jensen v. Lawrence,* 94 Wash. 148, 162 Pac. 40, the court specifically charged:

> "You are instructed that if at the time of the alleged assault, or within a reasonable time thereafter, the plaintiff did not make an outcry, and that she did not do so as soon thereafter as opportunity offered itself, unless she was prevented from making such outcry by fear and threats, plaintiff would not be entitled to recover; * * * "

This instruction is the unquestioned law and it is the law which was not applied in the present case. The libelant, Vargas, did not make any outcry and she did not make any complaint for months. There was no fear connected with her case, since obviously this waiter was not in a position to harm her. If a sufficient reason for not making a complaint is that such complaint is always unpleasant to the party making it, then no such complaint need ever be made in a case of rape until the actual accusation is made.

In *Linville v. Green,* Mo. App., a $3000 judgment for assault and battery on a 19-year-old girl by a 45-year-old man was affirmed. The court, dealing with the question of the calling out by the woman stated that this was not necessary in the case under consideration because the attack was so far off that the woman could not be heard. Referring to the general law of the situation the court, in the course of its opinion, said:

> "In Robinson v. Musser, 78 Mo. 153, the woman, who sleeping in bed with a daughter of her alleged assailant, permitted him, while she was awake, to lift her from the bed and carry

her to another part of the house, without making any outcry. She said she did this because she thought it would create a great scandal, and she felt that she was mistress of the situation. Enough of an outcry to awaken the daughter would have saved her honor, and the Supreme Court very properly thought she was far too complacent and considerate for her own good. And in another case (Champagne v. Haney, 189 Mo. 709, 88 S. W. 92), the prosecuting witness permitted herself to be 'ravished' while people were awake in an adjoining house 90 feet away, who could easily have been alarmed had she screamed. In that case the Supreme Court would not permit the charge of rape to stand. But, where the encounter occurs in an isolated place, without any likelihood that an outcry, however vigorous, will bring relief, we do not perceive why a woman thus assailed should scream, though, perhaps, it would be a very natural thing for her to do. For practical purposes, she would better save her breath for the physical struggle."

In the case here under consideration there were probably 300 people, including the crew, within a distance of 500 feet of where this alleged attack was going on. One scream by the Vargas woman would undoubtedly have been heard over a great part of the ship and would have been immediately investigated. Furthermore, any such scream would have obviously terrified this steward in case he was making any attack. For a member of a crew to be found attacking a passenger on shipboard is punishable by years in the penitentiary, and for this waiter to have made an attack when anyone was apt to respond to the screams of the woman would have been unthinkable and the act of a clearly insane person. But the libelant, Vargas, stated that she did not call out because

she did not think of it and because she did not know just who would come to her assistance.

In *Kramer v. Weigand,* Mo., 135 N. W. 230, the court upheld a $5000 judgment for assault and battery on a woman. The facts are not entirely clear, but it appears that the plaintiff was living at the home of the defendant and did not tell anyone about the assault for several weeks. It seems purely an assault case under different circumstances.

Schenk v. Dunkelow, 37 N. W. 886, was an action in which a judgment for $1500 for trespass to the plaintiff's person which resulted in the birth of a child, was affirmed. The time of delay of the woman in making the complaint and the actual facts of the case do not appear.

It is submitted that these cases are cases which do not in any way change the law as set out in the *Mills* case (supra) or set out generally as applying to the law of rape. The fact remains that it is a charge most easy to make and very difficult to rebut. This applies with overwhelming force to the case of some person who is sued for an alleged criminal assault committed by his Filipino servant five months before. It becomes practically extraordinarily difficult for the defendant to disprove the charge. This is because the defendant personally has no actual knowledge and must largely depend on what such a Filipino steward chooses to tell him.

Had the Circuit Court of Appeals gone into the facts and law of the case as a case *de novo,* as, in our opinion it was incumbent on it to do, and had it not practically refused to consider the facts because of

the decision of the court below, we are convinced that the decision would have been entirely different.

V.

CONCLUSION.

We earnestly believe that this case should be considered by the United States Supreme Court. This belief is primarily due to our feeling that the decision of cases without opinions or findings by the United States District Court should not be rewarded or encouraged by the Circuit Courts of Appeal. Such a system would be an intolerable injustice on litigants and it would make the administration of fair justice very difficult. We believe that where no opinion is written and no findings are made then that the Circuit Court of Appeals should review the case *de novo* and, arduous though it may be, study the record and give its opinion on both facts and the law. Anything less is, in our opinion, giving litigants in the United States courts much less than that to which they are entitled.

In the present case we think that the Panama Mail Steamship Company received very little consideration and is entitled to a real examination of the facts and the law by some court. In view of the lack of any such examination manifested by an opinion, we believe United States Supreme Court should give it. Unless we are singularly prejudiced we think that the Panama Mail Steamship Company did not receive anything like its due consideration in the courts below.

No one questions the existence or the merits of the principle of Appellate Courts giving great weight to findings of fact made by the lower courts after consideration of testimony given before them. But this does not mean that such a principle should be twisted and given the effect which was given it in this case by the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco,
September 23, 1929.

Respectfully submitted,

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